

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES)

v.)

MANNING, Bradley E., PFC)

U.S. Army, (b) (7)(C))

Headquarters and Headquarters Company, U.S.)

Army Garrison, Joint Base Myer-Henderson Hall,)

Fort Myer, VA 22211)

**DEFENSE MOTION FOR
JUDICIAL NOTICE OF
PUBLICLY AVAILABLE
IED INFORMATION**

DATED: 9 AUGUST 2013

RELIEF SOUGHT

1. PFC Bradley E. Manning, by and through counsel, moves this Court, pursuant to Military Rules of Evidence (MRE) 201 to take judicial notice of two news articles that discuss the counter-IED capabilities of the United State military. Moreover, the Defense requests this Court take judicial notice of several excerpts from these articles.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Defense has the burden of persuasion. RCM 905(c)(2). The burden of proof is by a preponderance of the evidence. RCM 905(c)(1).

WITNESSES/EVIDENCE

3. The Defense does not request any witnesses be produced for this motion.

LEGAL AUTHORITY AND ARGUMENT

4. In the interest of judicial economy, MRE 201 relieves a proponent from formally proving certain facts that reasonable persons would not dispute. There are two categories of adjudicative facts that may be noticed under the rule. First, the military judge may take judicial notice of adjudicative facts that are “generally known universally, locally, or in the area pertinent to the event.” MRE 201(b)(1). Under this category of adjudicative facts, it is not the military judge’s knowledge or experience that is controlling. Instead, the test is whether the fact is generally known by those that would have a reason to know the adjudicative fact. *U.S. v. Brown*, 33 M.J. 706, 709 (N.M.C.A 1992). The second category of adjudicative facts is those “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” MRE 201(b)(2). This category of adjudicative facts includes government records, business records, information in almanacs, scientific facts, and well documented reports. *Id.* See also, *U.S. v. Spann*, 24 M.J. 508 (A.F.C.M.R. 1987). Moreover, judicial notice may be taken of a

periodical. *U.S. v. Needham*, 23 M.J. 383, 385 (C.M.A. 1983)(taking judicial notice of Drug Enforcement Agency publication). The key requirement for judicial notice under this category is that the source relied upon must be reliable. Salzburg, Lee D. Schinasi & David A. Schlueter, *Military Rules of Evidence*, §201.02[3] at p. 2-7 (7th Ed., Matthew Bender & Co. 2011)

5. Under MRE 201(d), a military judge must take judicial notice if the proponent presents the necessary supporting information. In making the determination whether a fact is capable of being judicially noticed, the military judge is not bound by the rules of evidence. *Id.* Additionally, the information relied upon by the party requesting judicial notice need not be otherwise admissible. *Id.* The determination of whether a fact is capable of being judicially noticed is a preliminary question for the military judge. *See* MRE 104(a).

6. The Defense requests judicial notice of the existence of a July 2011 article from National Defense Magazine titled, "Pentagon Still Playing Catch-Up With Bomb Makers." *See* Attachment A. Moreover, the Defense requests the Court take judicial notice of several portions of text that appear within this article. The Defense offers these portions for the non-hearsay purpose of showing that the quotes were uttered and appeared in the article. The below excerpts are relevant because their publication, regardless of their truth, demonstrates that the enemy could have been aware of U.S. counter-IED deficiencies through means other than the WikiLeaks disclosures.

- a. "Our adversary changes quicker than we do."
- b. An insurgent "has no bureaucracy. He can do things quicker than I can do. Whenever I come up with a new jammer, I've got to look three moves ahead. What have I forced him to do now that I have this new jammer?"
- c. The services' bomb technicians have several tools to help them with their inherently dangerous work. The radio-frequency jammers to which (b) referred prevent insurgents from detonating bombs through the airwaves. Bomb suits provide some protection in the event that an IED explodes. Robots can provide a view of a bomb from a safe distance, and their manipulators can sometimes be used to render them safe without the specialists needing to put on the cumbersome suits. Metal detectors have been around since World War II. Recently, ground penetrating radar, which can see nonmetallic shapes, have been integrated onto the metal detectors. Explosives used to detonate IEDs in a controlled manner are also employed.
- d. Afghan IEDs have a low metallic signature, often employing wood as a casing. They are not technologically sophisticated and use materials that are readily available, he² said. They are difficult to find using standard mine detectors that seek out ferrous metals.
- e. Sensors carried into the field include the metal detectors, ground-penetrating radar and a device designed to find hidden tripwires.

¹ (b) is identified as (b) (7)(C) in a previous paragraph.

² (b) (7)(C) is quoted in the prior paragraph and his thoughts are continued in this paragraph.

7. The Defense requests judicial notice of the existence of a 15 September 2009 article published in the Washington Times titled, "EXCLUSIVE: Taliban makes IEDs deadlier." See Attachment B. Additionally, the Defense requests the Court take judicial notice of several portions of text that appear within this article. The Defense offers these portions for the non-hearsay purpose of showing that the excerpts were uttered and appeared in the article. The below excerpts are relevant because their publication, regardless of their truth, demonstrates that the enemy could have been aware of U.S. counter-IED deficiencies through means other than the WikiLeaks disclosures.

- a. The Taliban has been building simpler, cheaper anti-personnel bombs made of hard-to-detect nonmetal components, increasing the number of lethal attacks on NATO forces in Afghanistan, according to a confidential military report.
- b. The change in production from metal-dominated explosives to devices made of plastic is making it more difficult for ground troops to detect the buried IEDs with portable mine-detectors, creating an "urgent need" inside the Pentagon for better detection devices, the report said.
- c. The Pentagon report said the current mine detector, the AN/PSS-12, is not sufficiently sensitive to pick up the scarce metal in anti-personnel IEDs. "There is an urgent need to identify new man-portable detection platforms to expand the ability of U.S. troops to detect anti-personnel IED-mines," the report concludes.
- d. One system now readily available commercially consists of electric field sensors, which can pick up electricity from nonmetallic conductors, the report said.

CONCLUSION

8. Based on the above, the Defense requests that the Court to take judicial notice of the requested adjudicative fact.

Respectfully Submitted



JOSHUA J. TOOMAN
CPT, JA
Defense Counsel

I certify that I served or caused to be served a true copy of the above on MAJ Ashden
Fein, via electronic mail, on 9 August 2013.

A handwritten signature in black ink, appearing to read 'Joshua J. Tooman', written in a cursive style.

JOSHUA J. TOOMAN
CPT, JA
Defense Counsel